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01-7064

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

LEONARD GRAVES, Warden,
Cross-Petitioner,

v.

LOREN GLEN HUSS, JR.,
Cross-Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Leonard Graves is the custodian of habeas applicant Loren Glenn Huss, the Petitioner and Cross-Respondent in this matter, and has filed his own Conditional Cross-Petition for Certiorari. Mr. Huss opposes the Respondent's Cross-Petition on two separate grounds: first, in light of a retrial subsequent to the Eighth Circuit's grant of habeas relief, and the resulting acquittal of Mr. Huss on grounds of insanity, any further proceedings at the behest of the State of Iowa would violate Double Jeopardy; and second, the Respondent's Cross-Petition does not raise any legitimate basis for this court's grant of certiorari.

As both Mr. Huss's Petition for Writ of Certiorari and Mr. Graves' Cross-Petition make clear, Mr. Huss's effort to secure habeas relief is based solely on his claim that his second trial, in 1987, resulting in a jury verdict of guilty of murder, violated Double Jeopardy because his first trial, presented to a judge on a stipulated record, was terminated without the acquiescence of the defendant in the absence of a "manifest necessity." The Eighth Circuit Court of Appeals agreed. *Huss v. Graves*, 252 F. 3d 952, 958 (8th Cir. 2001). However, the Court of Appeals also concluded that the State, if it so elected, could retry Mr. Huss by resuming the first trial and submitting the same stipulated record to a new state

trial judge. *Id.* It is this aspect of the Court of Appeals' decision which is the subject of Mr. Huss' Petition for Writ of Certiorari.

Mr. Huss resisted the Eighth Circuit's remand on Double Jeopardy grounds, first by filing a Motion for Rehearing En Banc in the Eighth Circuit, and then by requesting the Eighth Circuit to recall its mandate until cert proceedings were complete in this Court. Both those efforts were unsuccessful. The State, declining to seek its own stay of the Eighth Circuit's mandate, elected to retry Mr. Huss as permitted by the panel decision. Mr. Huss made several Motions for a Continuance in state court to allow him to pursue certiorari in this court, all of which were resisted by the state. When those were unsuccessful, he pursued his efforts to stay the state proceedings to the Iowa Supreme Court, which efforts were successfully resisted by the state. Finally, on November 19, 2001, Mr. Huss filed an Application to Stay Mandate to this Court, to allow his Petition for Certiorari, filed on the same date, to be decided before the state retrial. That Application was denied by Justice Thomas on November 23, 2001.

The retrial was held on November 26, 2001 before Judge Linda R. Reade of the District Court for Polk County, Iowa; she took the matter under advisement and on December 13, 2001, found Mr. Huss not guilty by reason of insanity. State v. Huss, Iowa District Court of Polk County, Case No. FECR 31984 [hereinafter

State v. Huss], Findings, Conclusions, and Judgment Following Trial, at p. 17. On that same date, she ordered Mr. Huss remanded to the Iowa Medical and Classification Center of the Iowa Department of Corrections for an evaluation pursuant to Iowa Rule of Criminal Procedure 21(8), for the purpose of determining whether he should be criminally committed. State v. Huss, Order Pursuant to Iowa Rule of Criminal Procedure 21(8). The hearing on the state's effort to commit Mr. Huss was heard on January 7, 2002, and the matter is pending before the Honorable Robert Blink of the District Court for Polk County, Iowa.

Additionally, on October 16, 2001, the state of Iowa filed a petition to commit Mr. Huss as a Sexually Violent Predator, pursuant to Chapter 229A of the Code of Iowa, which petition is premised on his being released from custody on the basis of the Not Guilty by Reason of Insanity verdict. In Re the Detention of Loren G. Huss, Jr., Iowa District Court for Polk County, No. CL 87815, Petition.

REASONS FOR DENYING THE CROSS PETITION

The Cross-Petition is expressly conditional--the Respondent does not seek certiorari unless this Court grants Mr. Huss's Petition for Writ of Certiorari. But there are compelling reasons to deny the Cross-Petition, whether or not the Petition is granted. First, Mr. Huss's intervening acquittal on grounds of insanity renders the State's efforts to reinstate his prior jury verdict a violation of Double

Jeopardy. Second, the Respondent-Cross-Petitioner's claim that the ruling of the Eighth Circuit Court of Appeals granting habeas relief to Petitioner warrants review by the Court is without merit: the decision below is not in conflict with any other circuit, and it is not in conflict with any decision of this Court.

I. ONCE THE STATE ELECTED TO RETRY MR. HUSS FOLLOWING THE GRANT OF HABEAS RELIEF, AND HE WAS ACQUITTED ON GROUNDS OF INSANITY, DOUBLE JEOPARDY BARS ANY ATTEMPT BY THE STATE TO SECURE FURTHER REVIEW.

On December 13, 2001, following a trial initiated by the state, Loren Huss was found not guilty by reason of insanity. Given this verdict, the Constitution no longer permits the state, in an attempt to reinstate the jury verdict, to challenge the Eighth Circuit's opinion vacating the 1987 conviction.

Acquittals are afforded special protection by the Double Jeopardy Clause of the Fifth and Fourteenth Amendments; acquittals based on the merits are final and not open to review. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), this Court stated: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal...could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy,

and thereby violating the Constitution." *Id.* 430 U.S. at 571, quoting *Ball v. United States*, 163 U.S. 662, 671 (1896). The Court also defined what constitutes an acquittal entitled to such finality. "We must determine whether the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Id.*, 430 U.S. at 571.

The special protection afforded a straight acquittal extends as well to a verdict of not guilty by reason of insanity. "Such a factual finding [of not guilty by reason of insanity] *does* 'necessarily establish the criminal defendant's lack of criminal culpability'..., under the existing law; the fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles'...affects the accuracy...but it does not alter its essential character." *United States v. Scott*, 437 U.S. 82, 98 (1978)(internal citations omitted).

Thus, the Court has established two important principles. First, acquittals involving factual findings of guilt or innocence are final judgments barred from review by the Double Jeopardy Clause. Second, an insanity acquittal passes this test, and cannot be reviewed or disturbed. Since Mr. Huss is the beneficiary of a final verdict of not guilty by reason of insanity, any effort on the part of the state now to reinstate the former guilty verdict violates Double Jeopardy.

The state acquiesced in the merits of the Eighth Circuit decision on the issue of double jeopardy when it chose to proceed to a third trial over the Respondent's objections, in lieu of seeking review in this Court. The state had ample opportunity to seek a stay in order to challenge the ruling below. Instead, the state chose to retry Mr. Huss in compliance with the Circuit Court's remedy. This act of retrying Mr. Huss, which was subsequently followed by an acquittal, renders any attempt now by the state to seek review of the lower Court's decision a violation of Double Jeopardy. [1]

II. RESPONDENT'S CONDITIONAL CROSS-PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT OR ANY OTHER COURT.

The Respondent seeks certiorari from this Court on the asserted ground that the Eighth Circuit erroneously analyzed Mr. Huss's double jeopardy claim under

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[1] While the Double Jeopardy clause prohibits review by the State, Mr. Huss's Petition for Writ of Certiorari is not rendered moot by his acquittal by reason of insanity. As a result of this acquittal by reason of insanity, Mr. Huss is currently subject to the state's efforts to commit him both under Iowa Rule of Criminal Procedure 21(8) and the state's Sexually Violent Predator provisions, Ch. 229A (Iowa Code 2001). If this court determines that the third trial was not permissible, there is no lawful basis for either of these commitment procedures, so such a ruling would provide actual relief to Mr. Huss, rendering his efforts to secure certiorari a live controversy under Article III.

the "contrary to" clause of 28 USC §2254(d)(1).

Section 2254 (d) (1) provides:

> An application for a writ of habeas corpus ...shall not be granted...unless the adjudication of the claim–
> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Citing two Sixth Circuit cases, *Johnson v. Karnes*, 198 F.3d 589, 593 (6th Cir. 1999) and *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997), Respondent-Cross-Petitioner argues that the Eighth Circuit's decision conflicts with the rule in the Sixth Circuit, which, he posits, requires that double jeopardy claims properly characterized as involving mixed questions of fact and law be evaluated not under the "contrary to" clause, which is reserved for questions of law, but under the "unreasonable application" clause. Respondent's Cross-Petition for Certiorari at 9-11. But his argument has no basis in current law. *Johnson* and *Karnes*, both of which were decided before the Supreme Court's ruling in *Williams v. Taylor*, 529 U.S. 362 (2000), and their bifurcated approach to analyzing §2254(d)(1), are no longer good law following the *Williams* decision.

Before the *Williams* decision, the circuits were split on the proper interpretation of §2254(d)(1). The Fifth Circuit, *see, Lamb v. Johnson*, 179 F.3d 352 (5th Cir. 1999), Seventh Circuit, *see, Ashford v. Gilmore*, 167 F.3d 1130 (7th

Cir. 1999), and the Eleventh Circuit, *see, Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998), viewed the statute as requiring the court to apply the "contrary to" clause to questions of law, and the "unreasonable application" clause to mixed questions of fact and law. The Eighth Circuit, *see, Richardson v. Bowersox*, 188 F.3d 973 (8th Cir. 1999), along with the First Circuit, *see, Vieux v. Pepe*, 184 F.3d 59 (1st Cir. 1999) and the Third Circuit, *see, Matteo v. Superintendent*, 171 F.3d 877 (3d Cir. 1999), utilized what one scholarly source describes as "a two-step inquiry, in which the reviewing court first determined whether the Supreme Court had already developed a legal standard to 'govern' claims of the sort raised in the habeas corpus petition; cases coming within such a standard were subject to the 'contrary to...law' clause, leaving other cases subject to the 'unreasonable application of...law' clause." James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, § 30.2c at 210 (3d ed. Supp. 2000).

The Supreme Court's ruling in *Williams v. Taylor* resolved this conflict between the circuits. Justice O'Connor, in that portion of her opinion which constitutes the majority opinion, defined the "contrary to" clause of § 2254(d)(1) in the following manner:

> The text of 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court...A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in

> our cases...A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Williams v. Taylor, 529 U.S. at 405-406. [2]

This standard, which the Eighth Circuit applied in this case, has since been adopted by every Circuit. *See, e.g., Mastracchio v. Vose*, 274 F.3d 590 (1st Cir. 2001); *Washington v. Schriver*, 240 F.3d 101 (2nd Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257 (3rd Cir. 2001); *White v. Lee*, 238 F.3d 418 (4th Cir. 2000); *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001); *Brumley v. Wingard*, 269 F.3d 629 (6th Cir. 2001); *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001); *Siers v. Weber*, 259 F.3d 969 (8th Cir. 2001); *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000); *Hale v. Gibson*, 227 F.3d 1298 (10th Cir. 2000); *Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001). At least two circuits, the Fifth and the Ninth, have expressly characterized *Williams* as having rejected a bifurcated approach to §2254(d)(1). *Valdez v. Cockrell*, 274 F. 3d at 946; *Van Tran v. Lindsey*, 212 F.3d at 1149-1150. And the Sixth Circuit, upon which Respondent relies in his argument that a conflict exists

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[2] Respondent asserts that Justice O'Connor adopted the "law/mixed question of fact and law" analysis in *Williams*, citing 529 U.S. at 405. He erroneously ascribes Justice O'Connor's description of the law of the 4th Circuit on the matter as her "holding" in *Williams*.

between that circuit and the Eighth Circuit, now declines c .n to consider whether a claim is one of law or a mixed question of fact and law in analyzing the two prongs of §2254(d)(1). *See, e.g., Brumley v. Wingard*, 269 F.3d at 637-638; *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001)(Applying "contrary to" prong to an ineffective assistance of counsel claim).

Justice O'Connor not only rejected the bifurcated approach by embracing a standard that makes no distinction between questions of law and mixed questions; she tested the claim in *Williams* under both clauses without considering whether the claim might be characterized one way or the other. 529 U.S. at 405-406. In *Williams*, the claim was based on ineffective assistance of counsel, a paradigmatic mixed question of fact and law. Justice O'Connor did not hesitate to measure the claim under the "contrary to" clause of §2254(d)(1). *Id.* The Eighth Circuit in this case was similarly correct in measuring Mr. Huss's double jeopardy/manifest necessity claim under the "contrary to" clause.

Respondent-Cross-Petitioner makes no claim that the panel applied the wrong test to determine whether the Iowa Supreme Court's decision was "contrary to" clearly established double jeopardy precedent, nor does he assert that under that standard, the panel erroneously concluded that the Iowa Supreme Court's

opinion was in fact "contrary to" controlling precedent.[3] He is unable to identify any genuine conflict between the panel opinion and any Supreme Court opinion, or any conflict between the panel decision and any post-*Williams* decision from a sister circuit. His Conditional Cross-Petition should be denied.

CONCLUSION

For all the foregoing reasons, Petitioner-Cross-Respondent respectfully requests that the Respondent-Cross-Petitioner's Conditional Cross-Petition for Writ of Certiorari be denied.

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[3] Respondent alternatively argues that the Iowa Supreme Court's decision was not an "unreasonable application" of federal law. This argument is not an appropriate basis for granting the Respondent's Cross-Petition because the Eighth Circuit never addressed whether the Iowa Supreme Court's decision constituted an "unreasonable application" of federal law, so there is no ruling on that issue to review.